



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2005

Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2005-03023

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221669.

The Texas Department of Insurance (the "department") received two requests from the same requestor for information concerning complaints made to the department against Chesapeake Life Insurance Company. You inform us that some of the requested information is being withheld from disclosure in accordance with a previous determination issued to the department in Open Records Letter No. 2001-4777 (2001) (identifying information regarding enrollees in health plans). *See* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). We have also marked additional information that must be withheld under section 552.101 pursuant to the previous determination. To the extent that other portions of the submitted information are not otherwise excepted from disclosure pursuant to the previous determination, you claim that these portions are excepted from disclosure under section 552.101 in conjunction with the doctrine of common law privacy. You also claim that other portions of the submitted information are excepted under section 552.101 in conjunction with the Medical Practices Act ("MPA"), as well as under sections 552.136 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you did not submit the requested "listing of SCR codes for the justified complaints pertaining to The Chesapeake Life Insurance Company" for our review. Further,

you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request existed on the date the department received the request, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You note, and we agree, that portions of the submitted information consist of medical records. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The MPA, section 159.002(b) of the Occupations Code, provides the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). *See* Occ. Code §§ 159.002, .004; Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). We have marked medical information that may only be released in accordance with the MPA.

You argue that portions of the submitted information that are not otherwise excepted from disclosure pursuant to the previous determination are also excepted from disclosure under section 552.101 in conjunction with the common law right to privacy. This section encompasses common law privacy, which protects information that is 1) highly intimate or

embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that information identifying the enrollees in a particular health insurance plan is excepted from public disclosure, because such information implicates the common law right of privacy of the enrollee. *See, e.g.*, Open Records Decision No. 600 at 9-12 (1992) (personal financial choices concerning insurance are generally confidential). Upon review of the additional information you have marked, we agree that most of the information you have marked as identifying must be withheld under common law privacy. However, we do not believe that the remaining marked information identifies the insured and, therefore, this information may not be withheld under section 552.101 in conjunction with common law privacy. Because in this instance this information is not otherwise excepted from disclosure, it must be released. We have marked the information that must be released.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The department must, therefore, withhold the insurance policy and bank account numbers you have marked pursuant to section 552.136. We have marked additional information that must also be withheld under section 552.136. We note, however, that some of the information you have marked, including check numbers, are not “access devices” for purposes of section 552.136. As such, we have marked the information that may not be withheld under section 552.136. Because in this instance this information is not otherwise excepted from disclosure, it must be released.

Finally, you seek to withhold the marked e-mail addresses from disclosure under section 552.137 of the Government Code. This section provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
  - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
  - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
  - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You state that "there has been no such affirmative consent in this case." Thus, the department must withhold the e-mail addresses you have marked pursuant to section 552.137.

In summary, the department may rely on our previous determination issued to the department in Open Records Letter No. 2001-4777 (2001) with respect to information addressed in that ruling. Except where otherwise indicated, the department must withhold the information it has marked and that we have marked under section 552.101 in conjunction with common law privacy. Except where otherwise indicated, the department must withhold the information marked pursuant to sections 552.136 and 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

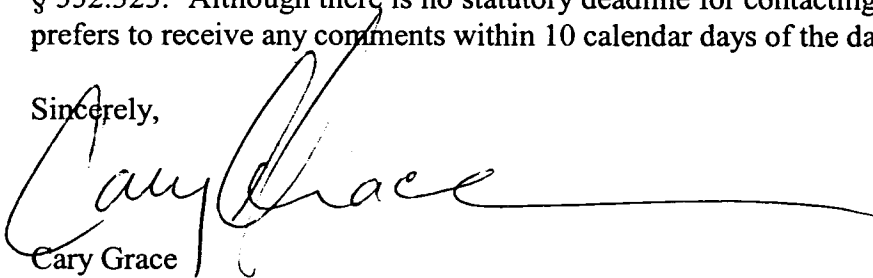
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/sdk

Ref: ID# 221669

Enc. Submitted documents

c: Ms. Nikki Johnson  
Benefit Recovery Specialists, Inc.  
1111 North Loop West, Suite 1000  
Houston, Texas 77008  
(w/o enclosures)